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In the Supreme Court of the United States

OCTOBER TERM, 1951.

No. 250.

UNITED STATES OF AMERICA,

Appellant,

v.

NEW WRINKLE, INC. and THE KAY & ESS COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

REPLY BRIEF BY NEW WRINKLE, INC. TO REPLY ON MOTION TO DISMISS BY THE UNITED STATES OF AMERICA, APPELLANT.

H. A. TOULMIN, JR.,

Counsel for New Wrinkle, Inc., specially appearing for the sole purpose of contesting jurisdiction of this Court and for no other purpose.

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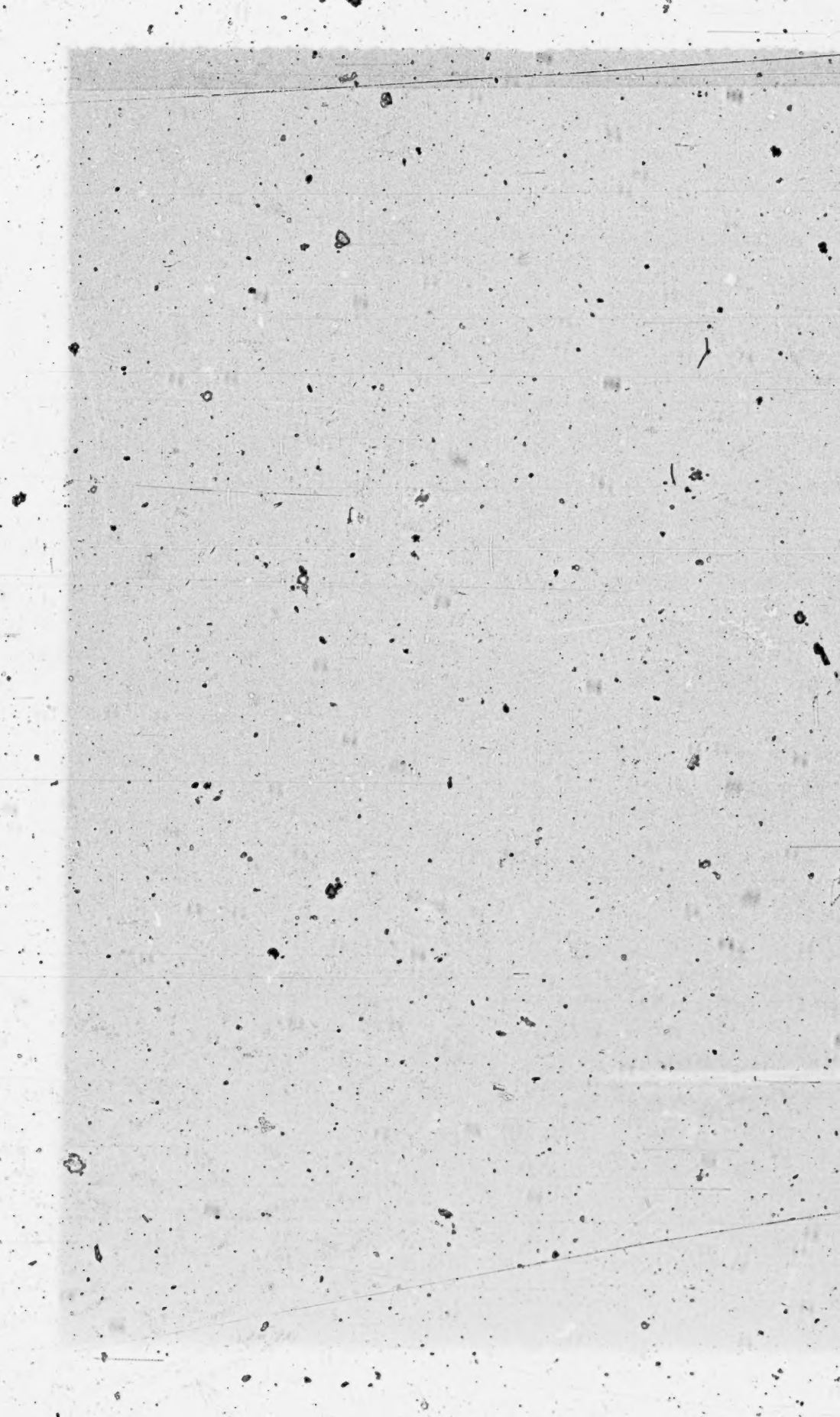

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The Government's attempt to shift its ground and rectify its failure to take an appeal from the decision of the District Court as to New Wrinkle, Inc., compels a Reply Brief.

Our position is a simple one:

(a) The Government failed to take an appeal on the issue decided against it below of whether a patent license granted to any manufacturer who wanted it, by a licensor who was not a manufacturer, with a stipulation as to the price at which its licensee could sell, constituted interstate commerce within the meaning of The Anti-Trust Laws of the United States.

(b) An open-ended license, open to any manufacturer, is within the jurisdiction of the patent

laws and, therefore, exempt by statute from The Anti-Trust Laws.

The Government quotes paragraphs 11 and 12 of the Bill of Complaint against New Wrinkle, Inc. at page 5 of its brief. These two paragraphs recite factual matters.

The Government attempts to claim that its paragraph 23 *constituting its legal conclusions* must be admitted as true because of the Motion to Dismiss. That is incorrect under the law as established by this Court in *Meccano, Limited v. John Wanamaker, New York*, 253 U. S. 136, 141, 142.

We address ourselves to the foregoing two issues raised in the reply brief. Our position is, as to the first, that the Government failed to take an appeal, not having made the correct "Assignment of Errors," the correct "Statement as to Jurisdiction" or the correct statement of "Questions Presented." As to the second proposition mentioned above and discussed by the Government at the end of its brief, our position is that the averments of paragraphs 11 and 12 show no jurisdiction in this Court because mere patent licensing is within the patent laws and is, therefore, within the statutory exemption of those laws from the operation of the Anti-Trust Laws. Therefore, there is no jurisdiction in the Court under the Anti-Trust Laws over such conduct as averred in paragraphs 11 and 12.

In detail, we observe as follows as to the position of the Government in its brief.

(1) "An Assignment of Errors must accompany the Petition for Appeal. Such an Assignment must preserve every point which Appellant may wish to raise in the Supreme Court." See "Supreme Court Practice" by Stern and Gressman, p. 210. *Comment*—In the Government's brief they realize they failed to assign error on the

part of the District Court in dismissing for lack of jurisdiction. That question was not raised in their Assignment of Errors. They have appealed only as to Kay & Ess.

(2) "The jurisdictional statement required by Rule 12 (1) is as important in the taking of an appeal as the citation is unimportant." P. 213, "Supreme Court Practice" by Stern and Gressman. *Note*—This book is cited by the Government and refutes its position that the jurisdiction is not important. Page 4 of the Government's brief says that our position was "too frivolous to warrant more extensive treatment than the footnote reference in note 3 of the jurisdictional statement." The footnote was not an assignment of error, as required by the Rules, to raise the issue of jurisdiction.

(3) Note that in the above mentioned book at page 215 it says:

> "In 1936 the Court amended Rule 12 so as to give counsel notice that the Jurisdictional Statement should include 'a statement of the grounds upon which it is contended the questions involved are substantial' (297 U. S. 733), citing *Zucht v. King*."

Also see 316 U. S. 715. He further states:

> "Thus all Jurisdictional Statements, from state or federal courts, must now state the grounds for believing the question to be substantial." (p. 216.)

The Government's position in its brief is that the question of jurisdiction which the Court below decided "was too frivolous to warrant more extensive treatment than the footnote reference in note 3 of the Jurisdictional Statement," yet in the same breath it is trying strenuously to overcome its failure to appeal on this important question. It admits that it did not assign error on the part of the District Court for dismissing New Wrinkle, Inc. for lack of jurisdiction.

Under Rule 12 it is required that the Appellant state the grounds which it believes to be substantial in support of its position and having failed to state such grounds in the appeal of New Wrinkle, Inc. it is in order to dismiss its appeal because it is not shown that as to New Wrinkle, Inc. there is any substantial reason for the appeal.

(4) It admits that the "Questions Presented" on its appeal were substantial only as to Kay & Ess Company. See the Government's brief, page 2. The Government admits that it failed to present the issue of jurisdiction in the New Wrinkle appeal in its Statement as to Jurisdiction, the very essence of the motion below resulting in the Court's judgment thereon sustaining New Wrinkle. The Government states (p. 2):

> "In the Questions Presented in its Statement as to Jurisdiction the Government set forth three questions with respect to the rights of a patentee to fix prices (all of which related to the point raised by Kay & Ess), *but did not mention the commerce question raised by New Wrinkle.*"[1]

Thus, the Government admits that it failed in its Statement as to Jurisdiction in the New Wrinkle case to raise the issue on the only point on which the District Court dismissed New Wrinkle below.

(5) The Government, after saying that the jurisdictional matter as to New Wrinkle, which was serious enough for the Court below to decide, was "too frivolous to warrant more extensive treatment than the footnote" (p. 4) and "that to the extent that the court below may have agreed with New Wrinkle's contention, the Government regarded its reasoning as erroneous" (p. 4), took no appeal on any issue as to New Wrinkle, Inc.

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[1] Emphasis ours unless otherwise stated.

The Rules of this Court require it. Even the Government itself should show such respect as to comply if it wished to do so.

If that be a fact, why did not the Government assign the lower Court's judgment against it as in error and raise the issue in its Statement as to Jurisdiction and Questions Presented? Having failed to do so, it cannot raise the question now and this appeal of the Government as to New Wrinkle should be dismissed.

The Government's position that it need not include this question of jurisdiction as to New Wrinkle in its "Statement as to Jurisdiction" because it was included in the Assignment of Errors is not well taken because *its statement on the jurisdiction was confined to the Government's right to appeal, but it did not include the fundamental question as to New Wrinkle in either the Statement as to Jurisdiction or the statement on Questions Presented as to the jurisdiction of the Court over New Wrinkle conducting no other business than that of a patent owner licensing its patents to all comers on an equal and fair basis to everyone.*

That simple question could have been raised if the correct appeal had been taken. It was not.

The Government, having failed either in its "Statement as to Jurisdiction" or in its "Questions Presented" or "Assignment of Errors" to raise the issue correctly of any error in the District Court's dismissal of New Wrinkle for lack of jurisdiction, that issue which the Government admits it thinks is "frivolous" and which it admits it did not raise, **makes the question as to New Wrinkle moot, leaving only the Kay & Ess appeal to be considered by this Court on the "Questions Presented," which the Government says "(all of which related to the point raised by Kay & Ess), but did not mention the commerce question raised by New Wrinkle."** (p. 2.)

The "Questions Presented" in the appeal (and therefore meant by its "Assignment of Errors") *are admitted by the Government in its brief not to apply to New Wrinkle.* (Government Reply Brief, p. 2.)

(6) The difficulty with the Government's position, when its relies upon the Assignment of Errors as raising the issue of the error of the District Court in dismissing New Wrinkle, Inc., is that in its reply brief it admits that the three questions to be presented to the Court based upon those Assignment of Errors do not refer to the actions of New Wrinkle, Inc.

In view of the fact that the Government admits that the questions for this Court to consider only relate to the Kay & Ess case, we respectfully submit we are correct that the Government failed to raise the question of dismissal for lack of jurisdiction over New Wrinkle and recognized that it did not intend its Assignment of Errors to cover this point because it says of its points in the "Statement as to Jurisdiction" that "(all of which related to the point raised by Kay & Ess)", (Government's Reply Brief, p. 2).

We, therefore, respectfully urge:

(a) The Government has failed to raise the issue of jurisdiction over New Wrinkle decided against it below.

(b) The points on which it wishes to present to this Court it admits in its brief (p. 2) "(all of which related to the point raised by Kay & Ess), but did not mention the commerce question raised by New Wrinkle." In view of this we say that the question has not come up here appropriately to determine the interstate commerce question of New Wrinkle.

(7) *There is no Jurisdiction Per Se: Ground for Motion to Dismiss Appeal.*

The Averments of the Bill of Complaint, paragraphs 11 and 12 *per se*, show there is no interstate commerce involved: that the actions of New Wrinkle are within the patent laws and, therefore, exempt from the Anti-Trust Laws.

We also direct the Court's attention to the fact that the Averments of Fact and Conclusions of Law quoted on page 5 of the Government's Brief *in paragraph 23 which have to do with the legal conclusions by the Government are not admitted by a Motion to Dismiss.* It is significant that the Government's statement "These allegations, of course, are admitted for purposes of dealing with the motions to dismiss" (p. 6); **cites no authority. The law is contrary to that proposition.**

There is a distinction between an averment of facts as in paragraphs 11 and 12 of the Bill of Complaint quoted on page 5 of the Government's Reply Brief, and the Government's allegations in paragraph 23, *which are its legal conclusions.* Such legal conclusions are not admitted. The authorities on this point are:

In *Meccano, Limited v. John Wanamaker, New York,* 253 U. S. 136, 141, 142, this Court said:

> "Petitioner maintains that its motion for final decree upon the merits should have been sustained. But the appeal was from an interlocutory order and the court could only exercise powers given by statute. On such an appeal a cause may be dismissed if it clearly appears that no ground exists for equitable relief; **but finally to decide a defendant's rights upon the mere statement of his adversary,** although apparently supported by ex parte affidavits and decrees of other courts, *is not within the purview of the act. He is entitled to a day in court with opportunity to set up and establish his defenses. The motion for final judgment was properly overruled.* Eagle Glass & Manufacturing Co. v. Rowe, 245 U. S. 275, 281."

The District Court decided that a mere patent licensee who is not manufacturing, selling or shipping anything in commerce and who stipulates the price under the doctrine of *United States v. General Electric*, 272 U. S. 476, does not come within the jurisdiction of the Sherman Anti-Trust Law because such actions are not interstate commerce. The Government failed to reopen that issue by its appeal.

It is obvious that paragraph 23 in the Bill of Complaint against New Wrinkle does not raise the jurisdictional issue here. *Stoll v. Gottlieb*, 305 U. S. 165, 176.

The jurisdictional facts are raised by the Government's Bill of Complaint in paragraphs 11 and 12 printed at page 5 of its Reply Brief. On the basis of those averments, *which deal with facts and not legal conclusions*, we moved to dismiss in the District Court below because such a state of facts does not show a cause of action under the Anti-Trust Laws of the United States and because there is no interstate commerce within the meaning of that term as applied by this Court for the reason that mere patent licensing, a lease contract, is not *per se* interstate commerce.

As the Government now denominates the jurisdictional question over New Wrinkle as to which it failed to appeal as "frivolous" (p. 4) the language of Mr. Justice Gray in *California v. San Pablo and Tulare Railroad*, 149 U. S. 308, 314, is most appropriate:

> "* * * *But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.* * * *"

The Anti-Trust Laws are based upon interstate commerce only. *United States v. Joint Traffic Association*, 171 U. S. 505, 567, 568, 573. Mere patent licensing is not inter-

state commerce. *Hopkins v. United States*, 171 U. S. 578, 588-9, 602; *Anderson v. United States*, 171 U. S. 604. That privilege being statutory under the patent laws exempts the patentee from the action of the Anti-Trust Laws so long as it stays within the patent laws.

The Sherman Act was enacted to prevent unreasonable restraint of commerce. This has been interpreted by this Court as recognizing that the statutory ground of patents is an exception to the operation of the Anti-Trust Laws so long as the patentee does not step outside of the lawful execution of his rights, such as patent licensing, under the Patent Laws. This Court so defined it in *United States v. Line Material Co.*, 333 U. S. 287, 304, 308, 309, 310, 312, in this language:

> "* * * The Sherman Act was enacted to prevent restraints of commerce *but has been interpreted as recognizing that patent grants were an exception.* Bement v. National Harrow Co., supra, 92, 21 Cong. Rec. 2457. * * * (333 U. S. 287, 309) *The monopoly granted by the patent laws is a statutory exception to this freedom for competition and consistently has been construed as limited to the patent grant.* Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 452, 455; United States v. Univis Lens Co., 316 U. S. 241; Hartford-Empire Co. v. United States, 323 U. S. 386. * * *" (p. 310.)

Patent licensing with a price control is within the patent laws as said by this Court:

> "The *General Electric* case construes that as giving a right to a patentee to license another to make and vend at a fixed price."
>
> *United States v. Line Material Co.*, 333 U. S. 287, 312.

Personal services, such as evidenced by patents and patent licenses, when subject to special statutory enact-

ment, can be so exempted by Congress from the Anti-Trust Laws. *United States v. Underwriters Association*, 322 U. S. 533, 560. The Patent Laws make such an exception so that to violate the Anti-Trust Laws one must step outside the Patent Laws. The granting of patent licenses is not such a step. *Standard Oil Company v. United States*, 283 U. S. 163, 169; *United States v. Line Material Co.*, 333 U. S. 287, 304, 307, 308, 309, 310, 312.

A patent license is a lease: leasing per se is not interstate commerce. "It is true that the mere making of a lease of the machines is not of itself interstate commerce." *United Shoe Machinery Corp., et al. v. United States*, 258 U. S. 451, 465.

"The mere formation of a contract between persons in different states is not within the protection of the commerce clause." *Western Live Stock, et al. v. Bureau of Revenue, et al.*, 303 U. S. 250, 253.

Contracts between citizens of different states and nothing more are not interstate commerce. *Chicago Board of Trade v. Olsen*, 262 U. S. 1, 32-3; *Moore v. New York Cotton Exchange*, 270 U. S. 293, 604. "It follows that sales for future delivery on the Board of Trade are not in and of themselves interstate commerce." *Hill v. Wallace*, 259 U. S. 44, 69.

Contracts, which are separable from the movement of materials such as a patent license and any subsequent action by the licensee in his manufacturing, do not come within the commerce clause and are not interstate commerce even though movement of materials in interstate commerce results. *Industrial Association of San Francisco v. United States*, 268 U. S. 64.

We, therefore, submit that the Government knows full well that it lacks jurisdiction over New Wrinkle, Inc., and that is why it made no statement as to jurisdiction

over New Wrinkle, Inc., assigned no specific error on this specific question and admits its three "Questions to be Presented" for argument before this Court do not apply to New Wrinkle, Inc. (p. 2) saying "all of which related to the point raised by Kay & Ess."

CONCLUSION.

We, therefore, say to the Court that the Government has not presented any questions for decision as to New Wrinkle, Inc., but only as to Kay & Ess, according to its own brief. It has not taken any appeal or presented questions on the issue of jurisdiction solely raised by New Wrinkle, Inc.

The lack of jurisdiction is obvious on the face of the papers before this Court in that paragraphs 11 and 12 of the Bill of Complaint quoted by the Government on page 5 of its brief show normal operation of the Patent Laws of the United States. New Wrinkle's acts are without the jurisdiction of the Anti-Trust Laws because (a) not constituting interstate commerce and (b) of a statutory exemption under the Patent Laws.

We urge the Court to dismiss the appeal as to New Wrinkle, Inc.

Respectfully submitted,

H. A. TOULMIN, JR.,

Counsel for New Wrinkle, Inc., specially appearing for the sole purpose of contesting the jurisdiction of this Court and for no other purpose.

August 1951.